# In the Supreme Court

OF THE

# United States



OCTOBER TERM, 1948

No. 233

JOAN BRODEL (professionally known as Joan Leslie),
*Petitioner,*

vs.

WARNER BROS. PICTURES, INC. (a corporation),
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## to the Supreme Court of the State of California
## AND
## BRIEF IN SUPPORT THEREOF.

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## PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California.

The petitioner, Joan Brodel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled cause on May 3, 1948 (Record, p. 14), reversing the judgment of the District Court of Appeal of the State of California, Division Two, entered on March 25, 1947, which judgment affirmed

the judgment of the Superior Court of the State of California, County of Los Angeles entered on May 20, 1946, sustaining the demurrer of the petitioner here (the defendant in the trial Court) to the complaint of the respondents here (Warner Bros.) without leave to amend.

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## QUESTIONS PRESENTED.

**1. The Supreme Court of California erred in finding that Section 36 of the Civil Code of the State of California, which arbitrarily designates three classes of minor employees who are denied the right to disaffirm their contracts, is not in violation of the Fourteenth Amendment of the Constitution of the United States, which forbids denial by the State of the equal protection of the laws.**

**2. The Supreme Court of California erred in accepting the interpretation of the Act of 1927 by the Legislature of 1947, and yielding to the attempt of the Legislature to usurp the judicial function of interpreting a past statute, in violation of the Fourteenth Amendment of the Constitution of the United States, which forbids denial of due process of the law.**

**3. The amendment of 1947 is unconstitutional in that it impairs the obligation of a contract contrary to Article I, Section 10, of the Constitution of the United States.**

In preliminary support of the petition, the petitioner desires to urge for the consideration of this Court the following:

THE JUDGMENT OF THE SUPREME COURT IN THIS CASE IS A FINAL JUDGMENT.

This Court has repeatedly declared that whether the judgment of a State Court is final or not does not depend on the designation which the State Court gives to its judgment nor on the terms used by the State Court in reaching its result, but depends on the situation created by the judgment which is sought to be reviewed. The fact that the case is remanded to the Court below without directions to enter a judgment is not conclusive. This is true even if the term "remanded" is used. This term "remanded", it will be noted, is not used by the Court in disposing of the appeal. (Record, p. 24.)

*Dept. of Banking v. Pink,* 317 U. S. 264, 268.

> "For the purpose of the finality which is prerequisite for review in this Court, the test is not whether the judgment is denominated final (Wick v. Sup. Ct., 278 U. S. 575; Cheltenham & Abington Sewerage Co. v. Penn. Public Ut. Comm. *post* p. 588) but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to review by a state court."

Cf. also

*Largent v. Texas,* 318 U. S. 418, 419-420.

In that case the petitioner, convicted in a County Court from which there was no appeal, could have had the constitutionality of his conviction tested by *habeas corpus.* The Court says:

"The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the state, does not affect the finality of the existing judgment."

Cf. also

*Bandini v. Sup. Court,* 284 U. S. 8, 14.

And

*Cole v. Violette,* 319 U. S. 581.

In the last case, this Court regarded an order of the Supreme Judicial Court as final, even though in the practice of Massachusetts, further proceedings were necessary in the State Superior Court.

But especially we should like to refer to *Richfield Oil Co. v. State Board of Equalization,* 329 U. S. 69 (67 Sup. Ct. 156) in which it is said at page 72:

"The designation given the judgment by state practice is not controlling. Dept. v. Pink, 317 U. S. 264, 268. The question is whether it can be said that 'there is nothing more to be decided' (Clark v. Williard, 292 U. S. 112, 118) that there has been 'an effective determination of the litigation'. Market St. Ry. Co. v. Railroad Comm., 324 U. S. 548, 551; see Radio Station WOW v. Johnson, 326 U. S. 120, 123-124."

If these tests are applied, it will be seen that, in the words of this Court, "there is nothing more to be decided" by the State Court, and "there had been an effective determination of the litigation."

The Supreme Court of California reversed the Courts below and, as the opinion discloses, decided adversely to the petitioner herein, rejecting all her contentions both on the non-Federal and the Federal questions. Although no specific order was issued for a new trial, the petitioner herein (defendant in the Court below) is obviously foreclosed on all the defenses she could possibly raise, if there is to be a new trial. All the Courts of California, so far as this case is concerned, would be bound by the decision of the Supreme Court of California and would be required to give judgment against the petitioner, just as effectively as if the Supreme Court of California had in express terms ordered judgment to be entered against her. The "new trial" and the judgment would be essentially a formal proceeding since the Superior Court of California would be without power to overrule the Supreme Court of California on questions definitely litigated here.

Nor can new questions arise. The opinion of the Supreme Court of California asserts that the plaintiff Warner Bros. "intends to amend its complaint." Nothing in the record supports this statement. On the contrary, there is overwhelming evidence that it will not do so and has no need of doing so. The Supreme Court decided that on the complaint, the plaintiff had a cause of action for an injunction under the appropriate sections of the Civil Code of California and that these sections were constitutional. That amply fulfills the plaintiff's prayer (Record, p. 11.)

both for a declaration of its rights and for an injunction.

The only other relief would be any claim for damages. Obviously if the plaintiff has a right to an injunction against a breach of a contract, it also has a right to damages instead of an injunction, if it is possible to assume that any damages have been sustained.

We should like to call attention to the case of *Wirth & Hamid Fair Booking v. Wirth*, 265 N. Y. 214, 192 N. E. 297, 301.

> "The remedy at law for a breach of contract is the collection of damages. Only where that remedy is inadequate may the equitable remedy of specific performance be invoked. A decree of specific performance is in effect and, in this case, even in form, an injunction to prevent a breach of the contract. *Quite obviously a suit for injunction against a breach of contract is inconsistent with a claim for damages caused by the same breach.*" (Emphasis added.)

The plaintiff may claim to have included this in the formal addition to its prayer. (Record, p. 12.) "6. For such further relief as may be proper." But plaintiff in Paragraph XII of its complaint asserts that no remedy but an injunction is "adequate" which implies that damages cannot in fact be computed. This is repeated in Paragraph XIV (Record, pp. 9, 10) and is the gist of the whole action.

It is the practice of this Court to look behind the form and examine the actual situation involved. This

case is not like the cases of condemnation cited in *Catlin v. U. S.*, 324 U. S. 229, in which the estimate of the amount to be paid is an essential part of the action and until that estimate is made, the judgment cannot be final. In those cases, it is certain that some compensation would be paid and there might be further litigation as to whether the amount would be just. The same may be said of those cases referred to a master for an accounting. *Mississippi R. Co. v. Smith*, 295 U. S. 718 (1935) and *Bruce v. Tobin*, 245 U. S. 18 (1917.) In all these instances, some amount was sure to be found due. In this case, it is quite inconceivable that any method could be devised to show how the loss of money—which is not even alleged by the plaintiff—could be computed. It is apparent from the plaintiff's own allegations in Paragraph XIV (Record, p. 10) that computation is impossible.

The purposes of refusing review to any judgment but a final one are stated in the case of *Catlin v. U. S.* (above, p. 7.) It is to prevent "piece-meal litigation." But there is no such danger here, if review is granted of the Federal questions involved. All the Federal questions that can be raised in this case are now before this Court and no new ones can be presented. The only effect of refusing review is to compel the petitioner to go through the form of raising them over again in the three Courts of California where they must inevitably be rejected and then after a delay, which may amount to several years, once more applying to this Court for review under the precise circumstances that are present here and now.

It is a well-known rule that when the highest Court reverses a judgment and leaves the Court below only the ministerial act of entering judgment for the appellant, that this is a final judgment and gives the United States Supreme Court jurisdiction to review the case. In this instance, the Court below has, in fact, if not in form, only a ministerial act to accomplish, since it cannot lawfully render any judgment in this cause except in favor of the appellant Warner Bros. (the respondent here).

The great hardship imposed on the petitioner of being compelled to litigate over again at a great expense of time and money, to a foregone conclusion, what is essentially nothing more than a ministerial act, is quite apparent.

If substance and not form is considered, it is submitted that the judgment of the State Supreme Court in this cause is a final judgment.

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## CONCLUSION.

The petition for a writ of certiorari should be granted.

Dated, Berkeley, California,
July 30, 1948.

Respectfully submitted,
MAX RADIN,
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BERNARD M. FITZGERALD,
*Attorneys for Petitioner.*

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**BRIEF IN SUPPORT OF**
**PETITION FOR A WRIT OF CERTIORARI**
**to the Supreme Court of the State of California.**

## POINT I.

### THE SUPREME COURT OF CALIFORNIA ERRED IN FINDING THAT SECTION 36 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, WHICH ARBITRARILY DESIGNATES THREE CLASSES OF MINOR EMPLOYEES WHO ARE DENIED THE RIGHT TO DISAFFIRM THEIR CONTRACTS, IS NOT IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, WHICH FORBIDS DENIAL BY THE STATE OF THE EQUAL PROTECTION OF THE LAWS.

There is a very natural and intelligible disinclination on the part of the Courts to declare legislation void as unconstitutional. This is especially noticeable when the Courts are asked to apply the requirement of the Fourteenth Amendment that no state shall deny its citizens and residents the equal protection of the laws. No one doubts that this forbids what is called class legislation and legislation in favor of individuals or against individuals. And equally no one questions, that, as the Supreme Court of California suggests in the instant case and the cases cited in support of it, a large discretion must be allowed to the legislature in determining what legislation is necessary, even if it adversely affects certain classes of the community.

But as these cases emphatically declare, this discretion is in no sense arbitrary. The legislature must have, or it must be possible to find, a reasonable and natural basis of any classification which is implied or expressly provided in a statute.

And the Courts cannot close their eyes to the fact, which is regrettably apparent in the statute under discussion (California Civil Code, § 36) that

legislatures respond to pressures in which economic interests are all too clearly present. There is not the slightest suggestion that this response has any improper background. Lobbyists are often extremely persuasive, and legislatures in matters where large public questions are not involved, are easily hurried into action of which the legislators do not see all the effects.

So many statutes are passed under these pressures, that, it is respectfully urged, the highest tribunal in the United States is fully justified in examining more closely than the Supreme Court of California has felt it proper to do, the exercise of a legislative discretion which results in this extraordinary situation, the situation, that is to say, which confers on the *producers of moving pictures and of plays,* the *owners of race-horses,* the *managers of prize-fighters and like,* a substantial and lucrative privilege which is not enjoyed by other corporations and individuals who make contracts with talented minors.

It is with this in mind that the petitioner undertakes to present for consideration the contention that the basis on which the Supreme Court of California offers to sustain this astounding piece of legislation is quite inadequate.

The Court declares (R. p. 23), "It can hardly be questioned that there are reasonable grounds for the statutory provisions withdrawing the right of disaffirmance from minors with regard to contracts to render services in the professions specified in Sec-

tion 36, if such contracts are found reasonable by a Court in a special proceeding for the examination thereof. Whether certain other groups of minors engaged in professions similar to those specified in Section 36 should be included is a matter of legislative discretion. New legislation such as this ordinarily first covers the field where it is most urgently needed, and may be extended in the light of experience."

The Court then quotes a number of cases.

In the *Western Fruit Growers* case (22 Cal. 2, 506) it was declared:

> "That a law is a general one, when it applies equally to *all persons* embraced in a class founded upon *some natural, intrinsic and constitutional distinction;* on the other hand, it is special legislation if it confers *particular privileges* or imposes *particular disabilities* or burdensome conditions in the exercise of a common right, upon a class of persons *arbitrarily* selected from the general body of those *who stand in precisely the same relation* to the subject of the law." (Emphases added.)

No exception whatever can be taken to this statement of the law, and it is submitted that if the rule is applied to the facts of this case it will be apparent that it strongly supports the petitioners' contention. Section 36 does *not* apply equally *"to all persons embraced in a class* founded upon some *natural, intrinsic and constitutional* distinction."

If we omit the word "constitutional" which begs the question, what is the *natural* and *intrinsic* distinction, which separates the three classes here selected from "the general body of those who stand in the same relation to the subject of the law"? The three classes consist of (1) dramatic producers and their minor actors and actresses; (2) employers of minor participants or players in professional sports including but not limited to boxers, wrestlers, and jockeys. The one common characteristic of the employees is that they must have exceptional skill and talent in their field, and that it is a field in which minors frequently exhibit such talent. This certainly is a natural and intrinsic element. But it is notorious and a matter of general knowledge, a matter of which all Courts may take judicial notice, that musicians frequently exhibit this high talent as minors. Indeed "infant prodigies" were known in this field long before they were known in the dramatic field. Exceptional talent is often found among young scientists and inventors who may make contracts with employers. What "natural and intrinsic" characteristic separates these classes?

The Court gives us no help in this. Certainly if any selection is "actually and palpably unreasonable and arbitrary" it is one which takes exceptionally talented minors and divides them into groups, some of which are deprived of the privilege of rescinding their contracts—a privilege which in California they can, after the age of 18, exercise only on equitable

conditions—and some are not. It is to be feared that the only distinction between the sub-classes here arbitrarily separated lies in the superior strength of the pressure groups which were active on behalf of the dramatic producers and the "sporting fraternity."

In the *Fruit Growers* case, the same standards of operation were required for both groups and both were fruit-growers. In *Rainey v. Michel* (6 Cal. (2d) 259, 270, 273), banks were held in themselves not to constitute an unreasonably selected sub-class of corporations. The danger from unsound banking is an obvious natural and intrinsic basis. In *Martin v. Superior Court* (194 Cal. 93, 101), the distinction between cities and counties with a population of 100,000 or over and cities and counties with less, was upheld as reasonable.

In *Title Rest. Co. v. Kerrigan,* 150 Cal. 289, 323-326, the omission of certain procedural requirements in relation to titles in San Francisco after the fire and earthquake of 1906, was held not to be an unreasonable distinction. In the case of *In re McKelvey,* 19 C.A. (2d) 94, 96, the Court held that the legislature might distinguish between wagers on horse-racing and on dog-racing. That there could be a legitimate reason for permitting a long established practice to go on while declining to permit a totally new one somewhat like it, is clear.

It is to be noted, however, that this last case was decided by an intermediate Court and that this Court felt it necessary to refer to the similar action of the

States of Illinois and of Kentucky to support it. This latter circumstance is one to which we shall recur.

It is hard to say how these cases can lend any support to a distinction that is based on no discernible natural difference and is not associated with any apparent public interest.

The Court calls attention to the fact which cannot be questioned, that the legislature may take up first one field in which a need shows itself and then go on to another. But even this one field may not be arbitrarily selected. And how can it be said that the need of regulating the contracts of minor actors and minor jockeys and prize-fighters has been shown to be the most immediately urgent subject of legislation as against other minors possessing special skill, such as musicians and inventors and others? It surely is not enough to suggest that there *might be* a reason, without indicating *what* the reason might be.

If it is seriously contended that the legislative "discretion" is absolute, then the prohibition of special legislation under the Fourteenth Amendment is completely nugatory. The Legislature has only to decide without showing any public need, that one small economic activity shall be burdened with restrictions and another left free, and the Courts will be denied the power of enquiring what the basis of the distinction is.

The petitioner has dealt so fully with these cases, in order to explain the Supreme Court of California's reluctance to deal with what under correction seems

a gross case of an arbitrary classification, and not because she regards them as in any way binding on this Court.

Before turning to the cases in this Court, cited in the opinion, it may be well to preface the discussion with the obvious statement that the four cases mentioned by the Court (*supra*, R. p. 23) evidently seem to the Court the strongest authority for their view.

If we turn to these cases we find the following:

The *Radice* case (264 U. S. 292), dealt with a law regulating hours of female employees in restaurants. The *Keokee* case (234 U. S. 224), dealt with a law forbidding the payment of employees of merchants and miners in scrip instead of money. In both instances, the laws were demonstrably based on frequent abuses injuring the health or welfare of a large number of persons affected by the laws. The *Carmichael* case (301 U. S. 495), was one involving taxation and the power of a legislature to tax arbitrarily—if it chooses—as long as no confiscation is involved—is beyond dispute.

In the case of *Bachtel v. Wilson*, 204 U. S. 36, the question was whether the cashier of a "free bank" indicted for embezzlement could be prosecuted constitutionally under Section 30 of the "Free Banking Act of Ohio" although Section 30 did not exist in other statutes permitting the conduct of banking business. The question really concerned a matter of statutory interpretation, and it was felt—no opinion had

been filed by the Supreme Court of Ohio—that the Court may have believed that other embezzling bank officials could be reached under the general criminal law, and that there was consequently no unconstitutional discrimination.

It may be noted that even in this case the Court makes the positive statement (*supra*, p. 41):

> "The power of a state legisature to select certain individuals for the operation of a statute is not an arbitrary power, one that it can exercise without regard to any principle of classification."

We may on the other side call attention to the following cases:

*Gulf Railway v. Ellis*, 165 U. S. 150 (1896), in which a Texas statute was considered which gave a claimant for wages against a railroad if successful, attorney's fees, a privilege which claimants for wages against other employers did not have. The Court held this to be an unconstitutional statute under the equal protection clause of the Fourteenth Amendment. The Court reviews a great many cases and fully establishes the principle.

In the case of the *Santa Fe Ry. v. Matthews*, 174 U. S. 96, in a dissenting opinion, four judges (Harlan, Brown, Peckham and McKenna) who had assented in the *Ellis* case refused to follow the Court when it attempted to distinguish a very closely similar case.

The *Gulf Ry.* case was cited with approval in the case of *Missouri Ry. v. Cade*, 233 U. S. 642, 648-649,

although the Court in the *Cade* case found that no discrimination had been practised.

It is similarly approved in such cases as *Santa Fe v. Vosburg,* 238 U. S. 56, in *Chicago & N. W. R. R. v. Nye, etc.,* 260 U. S. 35, 40, in which opinion Justices Holmes and Brandeis joined.

To say that no purpose of general welfare can be ascribed to the legislature in this legislation is not meant in disparagement of that body. It merely asserts that they were in error in supposing that such a purpose was present in the legislation presented to them and advocated by accredited representatives of the industry. In the cases in which laws have been sustained that involved some type of special legislation, it will be found that a class of persons needed protection, like the women employees in restaurants, the employees of large mining concerns forced to accept payment in scrip, or female employees in general, as in the case of *West Coast Hotel Co. v. Parrish,* 300 U. S. 379. But certainly it cannot be said that a great industry, which the Supreme Court of the United States has recently declared to have been long guilty of monopolistic practices, has a constitutional right to be protected against minor and occasional monetary losses.

We might respectfully call attention to the recent case of *Buck v. Harton,* 33 Fed. Supp. 1014, in which it was declared that the Legislature might not create a class of owners of copyrighted musical composition and give that class privileges not enjoyed by owners

of compositions protected only by common law rights. In that case it is said (p. 1020):

> "Said statute is class legislation: it is aimed only at proprietors of musical copyrights and it exempts the performance of musical works which are protected only at common law. A great many forms and varieties of copyrighted works other than musical compositions are presently and instantly dealt in, licensed and sold and otherwise made available within the State of Tennessee."

This is, to be sure, in the statement of the facts, but on page 1021, V., the Court indicates its acceptance of this contention.

Reference has been made to the fact that in the *McKelvey* case (19 Cal. App. (2d) 94, 96) cited with approval by the Supreme Court of California in the instant case (*supra*, p. 829) the Court felt it necessary to rely for support on the practice of other states. The petitioner would like to call attention to the fact that the situation which the Legislature met in a fashion which involves so arbitrary a classification, has been met by other states in a way that is not open to this objection.

That the privilege of infancy may be and has been abused can readily be conceded. The statement of Justice Crane of the New York Court of Appeals in *Sternlieb v. Normandie Nat. Sec. Corp.*, 263 N. Y. 240, 250, may be accepted with full approval.

> "That many young people under twenty-one years of age are improvident and reckless is quite evident, but these defects in judgment are by no

means confined to the young. There is another side to the question. As long as young men and women, under twenty-one years of age, are forced to make a living and enter into business transactions, how are the persons dealing with them to be protected if the infant's word cannot be taken or recognized at law? Are business men to deal with young people at their peril? Well, the law is as it is, and the duty of this court is to give force and effect to the decisions as we find them. Some states have met the situation by legislation."

The New York Law Revision Commission promptly made a study of legislation necessary to rectify these errors, and after an exhaustive study, presented a recommendation to be found in the Report of the Law Revision Commission of the State of New York for 1941, pages 45-48, which resulted in the amendment to the New York Debtor and Creditor Law, Section 260.

"§ 260. *Infants' contracts: when they may not be disaffirmed.*

1. A contract hereafter made by an infant after he has attained the age of eighteen years may not be disaffirmed by him on the ground of infancy, where the contract was made in connection with a business in which the infant was engaged and was reasonable and provident when made.

2. In any action or proceeding in which the right to disaffirm on the ground of infancy a contract made by an infant after he has attained the age of eighteen years is in issue, the burden

of proof on the question whether the contract was made in connection with a business in which the infant was engaged, and also on the question whether the contract was reasonable and provident when made, shall be upon the person seeking to deny or defeat such disaffirmance or to enforce the contract. Added L. 1941, c. 327, eff. April 13, 1941."

The Legislature in attempting to reach an admitted evil, did not single out dramatic producers, managers of prize fighters and owners of race-horses. It chose to protect *all* employers of infants against abuse of the infant's privilege of rescission. And the situation in New York is one in which the interests of dramatic producers and managers of athletic events are fully present in the minds of the public.

The same Law Revision Commission published as Legislative Document (1938) No. 65(I), "Recommendation and Study Relating to Infancy as a Defense to a Contract," submitted with Senate Introductory, No. 74, and Assembly Introductory, No. 104. In that pamphlet it lists the legislation of twenty-five states (pp. 51-67)—now twenty-six—which have sought to amend the common law privilege of infants. All of them have deprived infants of that privilege to some extent and often on the condition that the contract could be shown to be reasonable.

*Only California has done this in the exclusive interests of three types of employers, who cannot be reasonably distinguished from others.*

If the Legislature had limited its action to cover the contracts of minors of talent, when equal services could not be readily secured in the open market, there might be a justification. But to take even this limited classification and arbitrarily sub-classify it to include only actors and actresses, jockeys, prize fighters and other athletes, is an act for which it is practically impossible to find a rational basis.

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**POINT II.**

**THE SUPREME COURT OF CALIFORNIA ERRED IN ACCEPTING THE INTERPRETATION OF THE ACT OF 1927 BY THE LEGISLATURE OF 1947, AND YIELDING TO THE ATTEMPT OF THE LEGISLATURE TO USURP THE JUDICIAL FUNCTION OF INTERPRETING A PAST STATUTE, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, WHICH FORBIDS DENIAL OF DUE PROCESS OF THE LAW.**

The petitioner wishes to point out that this question involving the constitutionality of the action of the Supreme Court of California, could not have been raised during the original proceedings nor before the District Court of Appeal.

The judgment in favor of the petitioner was affirmed by the District Court of Appeal on March 25, 1947 and a hearing was granted by the Supreme Court on May 22, 1947. While the case was pending in the Supreme Court, the Legislature of California amended Section 36.2 to read in part as follows:

> "A contract, otherwise valid, entered into during minority, cannot be disaffirmed upon that ground either during the actual minority of the

person entering into such contract, or at any time thereafter, in the following cases:

* * * * * * *

"2. A contract or agreement employing such person as, or wherein such person agrees to perform or render services as, an actor, actress, or other dramatic performer, or as a participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers and professional jockeys, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed. Such approval may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and said court shall have jurisdiction to approve, and its approval when given shall extend to the whole of said contract or agreement, and of all the terms and provisions thereof, including, but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof."

(Stats. 1947, ch. 526, § 1.)

It further added [Stats. 1947, ch. 526, § 2]:

"The amendment made by this act does not constitute a change in, but is declaratory of, the *preexisting law.*" (Emphasis added.)

The petitioner submits that this is an open and direct attempt to usurp the judicial function of in-

terpreting a statute, and since the exclusive power of a Court to do this, is an essential element in due process of law, the acceptance by the Supreme Court of an interpretation made by an unqualified body is a denial of such due process.

The petitioner could not have known that the Supreme Court would accept this amendment as determinative of the issues here, till the judgment by that Court on May 3, 1948. The first time, therefore, at which the constitutionality of this amendment could be called in question was after that judgment. And the petitioner here in her petition for a rehearing before the Supreme Court, duly attacked the validity of the amendment.

This amendment was not merely an attempt to give retroactive effect to a statute. It declared in set terms that the Legislature was undertaking the judicial function of interpreting an existing statute. It is so understood by the Supreme Court of California. (Record, p. 22.)

> "We are here concerned with section 36, as it read before the 1947 amendment. In 1947, after the order approving the contract between the parties had been entered the provisions of section 36 were amended by the Legislature. The intent of the Legislature was to leave no doubt as to the meaning of section 36, and in no wise to change it, for it declared: 'The amendment made by this act does not constitute a change in, but is declaratory of, the preexisting law.' (Stats. 1947, ch. 526 § 2.)"

The time at which the amendment was passed leaves little doubt that the Legislature had this case in mind and desired to do *nothing less than reverse the judgment of the District Court of Appeal in the very case it had decided,* not merely change the law on the subject.

It may be noted that the amendment was passed with considerable speed. The rehearing in the District Court of Appeal was denied on April 9, 1947. [179 Pac. (2d) 57]. The bill to amend section 36.2 was introduced in the California Assembly on April 16, 1947. It was approved by the Senate and approved with slight changes which were concurred in by the Assembly. It was sent to the Governor on *May 26,* 1947 and approved by him on June 3, 1947. (Final Calendar of Legislative Business, Cal. Legislature, 57th Session, 1947.)

On *May 22,* 1947, before the bill was sent to the Governor, a hearing had already been granted by the Supreme Court. The obvious purpose of foreclosing a decision is apparent from the use of the term "pre-existing" law, by the Legislature.

The haste with which the Legislature rushed to override a judicial decision in a pending case is apparent from this fact. Section 36.2 was necessarily supplemented by Labor Code of California, 1640.5 [Stats. 1941, ch. 595, § 1, p. 1979], which adds the quality of disaffirmability of minors' contracts to perform dramatic services to contracts of such minors with their agents. In view of the fact that these agents are at

present a vital element in the industry, the addition was necessary, if Civil Code §36.2 is a valid enactment.

But in their haste the Legislature omitted to apply their interpretation of "pre-existing law" to Labor Code 1640.5, so that the nature of the contract approved may be one thing under Civil Code § 36.2 and another under Labor Code § 1640.5.

We may omit any discussion of the gross impropriety of the interference by the Legislature in a pending case. The petitioner desires to present to this Court merely the question of legislative power.

That the interpretation of a statute is a judicial function and not a legislative one hardly needs argument to prove. It has been so held by this Court on a number of occasions.

*Elmendorf v. Taylor,* 23 U. S. 152;
*Bank of Hamilton v. Dudley's Lessee,* 27 U. S. 492.

It has been held that the recital in a statute that a former statute was repealed is not conclusive, since interpretation is a judicial and not a legislative function. *U. S. v. Claflin,* 97 U. S. 546.

Even if weight may be given to a legislative statement of the intent of a previous act, this statement *may not control judicial action. U. S. v. Stafoff,* 260 U. S. 477, 480. And in that case, this construction was rejected.

In this case the Supreme Court of California (*supra,* p. 22) clearly regarded itself as controlled by the words of the Legislature. It accepted the

amendment as controlling it on the question of what the section 36, as passed in 1927, meant, and that is precisely what the Constitution forbids them to do.

In other words the determination of this case by the highest Court of the state was made under the control of a non-judicial body.

The Constitution of California expressly states (Art. III, § 1), that the three powers of government shall be separate and that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function belonging to either of the others".

Even if that had not been so stated, the principle that judicial action can be undertaken only by a duly qualified Court is implied in our entire scheme of government. It is of course true that judicial power might have been conferred by the Constitution of California on the Legislature, or on one of its branches. But that is precisely what has not been done. On the contrary, judicial power has in set terms been denied to the Legislature.

Due process of law is concerned not merely with the initial stages of judicial procedure but with all * * * its stages.

As an illustration that actions of appellate tribunals as well as of other governmental agencies are governed by the Constitutional provision for due process, we may cite:

*Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 266.

As said by Justice Coleman in *U. S. v. 43.7 Acres of Land,* 43 Fed. Supp. 345, 352:

> "The judicial process, once fairly invoked, must be kept inviolate in all its stages, without fear or favor."

The Supreme Court of California when it accepted, as controlling it in its judicial functions, this attempt of the Legislature to interpret a past statute, is in effect delegating judicial power which is forbidden by our constitutional system.

Cf.:

*Van Slyke v. Ins. Co.,* 39 Wis. 390. 20 Am. Rep. 50;

*State v. Noble,* 118 Ind. 350, 21 N. E. 244.

We may add the case of

*Bullock v. McGerr,* 23 Pac. 980; 14 Colo. 577, where in a syllabus prepared by the Court, it is held that:

> "The Supreme Court alone can promulgate opinions and render judgments, and its duty is not discharged by the adoption *pro forma* of the conclusions of the Supreme Court Commissioners."

This is cited by this Court in *Butler v. Gage,* 138 U. S. 52, 59.

If the Supreme Court had declared that its judgment of reversal was determined by the interpretation placed on a statute by a group of private persons, that would be contrary to due process. So far as a judicial

function is concerned, the Legislature of the State is a group of private persons and a judgment made under its direction is just as clearly a judgment without due process.

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## POINT III.

### THE AMENDMENT OF 1947 IS UNCONSTITUTIONAL IN THAT IT IMPAIRS THE OBLIAGTION OF A CONTRACT CONTRARY TO ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES.

It is possible to interpret the Amendment of 1947 (*supra*, p. 24) not as an unconstitutional attempt to exercise a judicial function and thus to deprive the petitioner of her contract-rights without due process of law, but in a slightly different way. In order to give the most favorable construction to it, it might be interpreted as a statute determining that option-contracts come within Section 36.2 of the Civil Code and further that this provision is to have retroactive effect.

There is no doubt that in civil matters, the Legislature has the power to pass a retroactive statute.

*Welch v. Henry*, 305 U. S. 134.

This, however, is conceded to be fundamentally inequitable and no such effect will be given unless it expressly appears from the wording and purpose of the statute.

But in any case, a retroactive effect cannot be given, if to do so would deprive any person of prop-

erty—including contract rights—without due process of law, or if it would impair the obligation of a contract.

*Charles River Bridge v. Warren Bridge,* 36 U. S. 420, 539-540;

*Shreveport v. Cole,* 129 U. S. 36, 43;

*Oshkosh Waterworks Co. v. Oshkosh,* 187 U. S. 437, 446.

In *Ogden v. Saunders,* 25 U. S. 213, a retroactive law which impairs the obligations of contracts was defined as "a law which enlarges, abridges or in any manner changes the intention of contracting parties."

Further in *Rairden v. Holden,* 15 Ohio St. 207 at 210, the definition of Story was cited and approved.

> "Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, *or attaches a new disability*, in respect to transactions or considerations already passed, must be deemed retrospective."

And the case goes on to declare that, on the basis of this statement, a law which, while not unconstitutional in itself by the mere fact of being retrospective, was unconstitutional if it changed obligations already in existence.

While it is admitted that the Legislature may change the age of majority, and by implication may change the privileges of infancy, it may not do so in

respect of persons, when rights in a particular contract have already accrued before the enactment. Cf.

*Pickering v. Peskind,* 183 N. E. 301, 303, 43 Ohio App. 401;

*Springstun v. Springstun,* 131 Wash. 109, 229 Pac. 14;

*Smith v. Smith,* 104 Kan. 629, 180 Pac, 231;

*Dougal v. Fryer,* 3 Mo. 40, 22 Am. Dec. 458;

*Reisse v. Clarenbach,* 61 Mo. 310;

*Wilson v. Greer,* 50 Okl. 387, 151 Pac. 629;

*Nahorski v. St. Louis Elec. Ry.,* 310 Mo. 227, 274 S. W. 1025.

That the Amendment of Civil Code § 36.2 impairs the obligation of an existing contract, is clear. The contract made between the petitioner Brodel and Warner Brothers so far as the options were concerned was, as contended by the petitioner and as appears from the opinion of the Supreme Court, a one year contract for services and four option contracts. Omitting for the present, the question of the constitutionality of the classification as set forth above in Point I (*supra,* p. 10), the petitioner's contract was subject to the limitation of Civil Code § 36.2 *as it stood in 1927,* only *as to the contract for services.* The option contracts although contained in the same document, were separate contracts.

If the statute of 1947 is construed in the most favorable way for constitutionality, it is an attempt in 1947 to make the contracts the petitioner entered into in 1927—a contract for services and four optio. contracts—into a single contract and applying the rule

that the approval of the contract for services, shall carry with it, approval of

> *"all the terms and provisions thereof, including but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof."*

As has been pointed out, these words do not appear in the statute of 1927, under which the petitioner made her contract. To apply them, after twenty years, to her contract, imposes on her a contract she did not make at all, and deprives her of the right of rescinding her option contracts, which not *being contracts for services* did not come under the 1927 statute,—assuming for a moment that a statute would be valid even for contracts for services, rendered by an arbitrarily selected class of minor employees.

No more drastic impairment of a contract can be imagined than that of turning a rescindable contract into a nonrescindable one.

In the recent Minnesota case of

*In re Davidson,* 26 N. W. (2d) 223,

which went as far as possible in accepting the right of the Legislature to change the age of majority and thereby deprive persons of privileges which they assumed they had, the following note was appended at the end.

> "Although the issue is not involved in the instant case, it is helpful to an understanding of the nature of the *status* to observe that amendatory legislation postponing the age of majority has

been held not retroactive so as to effect pre-existing substantive rights which have come to fruition before the amendatory act took effect."

The Court goes on to quote more of the cases cited above.

Under these circumstances, it is urged that the Legislature may not constitutionally, either by assuming to "interpret" a law passed twenty years earlier, or by retroactive amendment, deprive the petitioner here of the substantive rights arising out of a contract she had made under the law as it existed before the amendment.

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Respectfully submitted,
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